

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KARL LEONARD RADATZ,

Defendant-Appellee.

UNPUBLISHED

January 19, 2001

No. 223743

St. Clair Circuit Court

LC No. 99-002357-FH

Before: Smolenski, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

The prosecution appeals by right from the circuit court's order disallowing other-acts evidence and quashing an information charging defendant with attempted second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii); MSA 28.788(3)(1)(b)(ii). We reverse.

The district court, in binding defendant over for trial, indicated that certain other-acts evidence – namely, evidence that defendant sexually assaulted two other individuals – was the only evidence establishing defendant's sexual intent in touching or attempting to touch the complainant in the instant case. The circuit court ruled that the other-acts evidence could not be the *sole* evidence of intent and that there must be additional, competent evidence of defendant's sexual intent before the other-acts evidence would be admissible to help prove intent. Because this additional evidence was lacking, the circuit court disallowed the other-acts evidence and quashed the information. The prosecution contends that the circuit court erred in ruling the evidence inadmissible and dismissing the charge against defendant.

The standard of review for this issue was set forth in *People v Beasley*, 239 Mich App 548, 552; 609 NW2d 581 (2000), as follows:

The decision to bind a defendant over is reviewed for abuse of discretion. . . . In reviewing a district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. . . . Reversal is appropriate only if it appears on the record that the district court abused its discretion. . . . This Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. [Citations omitted.]

See also *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998) (indicating that evidentiary issues are reviewed for an abuse of discretion).

Evidence of a defendant's prior bad acts is admissible as substantive evidence under MRE 404(b)(1) as long as the three requirements set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), are met. First, the evidence must be offered for a proper purpose other than to prove the defendant's character or propensity to commit a crime. *Id.* at 74. Second, the evidence must be relevant to an issue or fact of consequence at trial. *Id.* Third, the evidence's prejudicial effect must not substantially outweigh its probative value. *Id.* at 74-75; *Starr, supra* at 496.

Here, the prosecution was required to prove that defendant attempted to touch the complainant with sexual intent. See MCL 750.520c(1)(b)(ii); MSA 28.788(3)(1)(b), MCL 750.520a(k); MSA 28.788(1)(k). The other-acts evidence was properly offered – and was relevant – to show that the attempted touching of the complainant was not innocent, as she claimed and as defendant emphasized on cross-examination, but was instead done for sexual purposes. See *Vandervliet, supra* at 78-81. Cf. *People v Sabin (After Remand)*, ___ Mich ___; ___ NW2d ___ (Docket No. 114953, decided 7/27/2000), slip op, p 26. Defendant's intent was indisputably at issue in this case, as evidenced, in part, by the defense attorney's cross-examination of the complainant, and the other-acts evidence was relevant to establish that his intent was sexual. See *People v Vesnaugh*, 128 Mich App 440, 447-448; 340 NW2d 651 (1983).

Moreover, we cannot say that the potential for unfair prejudice substantially outweighed the probative value of the other-acts evidence, since the evidence was highly probative of defendant's intent, and since no "unfair" prejudice was apparent. See *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999), and *Starr, supra* at 499-500. Accordingly, because the challenged evidence satisfied the three-pronged *Vandervliet* test, we cannot, upon our de novo review of the circuit court's decision, deem the district court to have abused its discretion in allowing the other-acts evidence and binding defendant over for trial. Contrary to the circuit court's belief, neither MRE 404(b) nor *Vanderliet* indicates that other-acts evidence may be used to prove an element of an offense only if additional, non-other-acts evidence of the element exists.

Reversed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder